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IN THE

Supreme Court of the United States

October Term, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Transcontinental & Western Air, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 6, 1952.

Opinions Below

The opinion of the District Court (124-130)* has not been reported. The opinion of the Court of Appeals revers-

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

ing the judgment of the District Court (164-180) is reported in 199 F. 2d 117.

Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1952 (180). A petition for rehearing filed on October 20, 1952 was denied on November 10, 1952 (181). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act.

3. Whether the Court of Appeals, under the circumstances revealed by the record, decided an important question of local law in a way probably in conflict with applicable local decisions when it held that respondent had not waived the contract requirement of notice of hearing as a matter of law.

Statute Involved

The pertinent provisions of Title II Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.*, are printed in Appendix A, *infra*, pp. 23-27.

Statement

Respondent Koppal brought action in the United States District Court for the Western District of Missouri, Western Division, based on diversity of citizenship, claiming that he had been wrongfully discharged contrary to the terms of a collective bargaining agreement between petitioner and International Association of Machinists, a union representing the mechanics and related employees in the service of petitioner (1-18). Respondent was not a member of the union (2, 137). Petitioner as a carrier by air was subject to the Railway Labor Act and the contract was made pursuant to the Act so far as applicable (2, 19). It was stipulated by the parties that the contract was a Missouri contract (125).

Respondent in his complaint prayed for actual damages in the sum of $7,500 and for punitive damages in the sum of $15,000, averring that according to the union contract seniority, job and employment rights were vested in him of which he could not be deprived without just cause or reason. The union contract (Ex. A, 29-30, 31-88) did not prescribe what should constitute grounds for discharging an employee but respondent averred that he was wrongfully and unlawfully discharged for an alleged violation of the sick leave rule, that he was discharged without a fair hearing, was not notified in writing of the precise

charge against him and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to the time of his discharge (1-18).

Upon the trial in the District Court, the following facts were established:

Respondent and one DeMattia, a fellow worker, were suspended from employment by petitioner on November 9, 1949, on the charge of abuse of sick leave pay privilege under the union contract (135; Ex. 1, 29-30, 88-89; Ex. A, Art. XVII (j), 80).

Immediately following their suspension, respondent and DeMattia were orally notified (135, 159) that a hearing would be granted them pursuant to the provision of the union contract governing discharge (Ex. A, Art. XI (b) (10), 67-68), which provides that:

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee."

The hearing was set for November 11, 1949, that date having been agreed upon with respondent (135). A letter was also written to respondent and the union grievance committee notifying them of the hearing (Ex. 1; 88-89). While the union stated that its copy was received on November 10 (152), respondent testified that he did not receive his copy until November 12 (97, 136), the day following the hearing. In any event respondent voluntarily attended the hearing on November 11, heard the written notice read and stated he was ready to proceed (97, 136, 151, 152, 154).

Evidence was presented at this hearing that respondent and DeMattia were both absent from work on November 8, 1949 (133, 140). Being shorthanded their foreman sent to see if they could report to work that afternoon (154), resulting in the discovery that respondent and DeMattia, who was discovered at respondent's home on the day of the alleged illness, had met by prearrangement to prepare for an examination for a higher position (133, 149-150, 152). There were various other circumstances indicating that both men were guilty of abusing their sick leave privileges (135, 143, 153, 154-155, 158).

As summarized by the Court of Appeals in its opinion (166), "the evidence produced at this hearing was such that . . . anyone called upon to hear and weigh the testimony and circumstances could properly conclude and find therefrom that plaintiff had not been honest in this claim of illness and had been guilty of abusing his sick-leave privileges."

At the conclusion of the hearing the hearing officer stated that it was his decision that there had been a severe case of abuse of sick leave privilege and that the two men would be discharged. However, in order not to prejudice their securing other employment he offered them an opportunity to resign if they so desired (159). Both respondent and DeMattia handed in written resignations (Ex. 2, 29-30, 89), respondent indicating that he was doing so reluctantly and "under protest" (98, 138).

The contract provided that if the initial decision of the hearing officer was unsatisfactory an appeal could be taken to the chief operating officer of petitioner (Ex. A, Art. XI (b) (5)(10), 66-68).

Both men were specifically advised that notwithstanding their resignations they could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

At the trial petitioner argued that because of respondent's failure to appeal to petitioner's chief operating officer respondent could not present a justiciable controversy in a Missouri forum. The District Court allowed the case to go to the jury and a verdict in favor of respondent in the amount of $7,500 was returned on March 10, 1951 (118). Thereafter, however, on motion of petitioner, the District Court on June 7, 1951, set aside the verdict and entered judgment dismissing the complaint (120-121).

The District Court held that the contract, being a Missouri contract (125), was to be interpreted according to the law of the State of Missouri and that the cases of *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 68 F. 2d 826, required that plaintiff, under the facts of this case, exhaust the remedies provided in his contract of employment to have his cause of discharge reviewed on appeal, as provided in the contract, before bringing an action on the contract for wrongful discharge (126).

In addition, because he believed he had erred under Missouri law in allowing the jury to consider mental anguish as an element of damages, the District Judge alternatively ruled that if, on appeal, it should be held that he erred in dismissing the complaint, there should nonetheless be a new trial unless plaintiff filed a remittitur of $6,200 (120-121, 129).

On July 7, 1951, respondent filed his notice of appeal in the District Court (130). The case was orally argued in the Court of Appeals on March 7, 1952 (163).

The Court of Appeals on October 6, 1952 (180) reversed the order of the District Court and remanded the cause for further proceedings with an opinion by Judge Johnsen, a concurring opinion by Judge Collet and a dissenting opinion by Judge Riddick (164-180). Judges Johnsen and Collet held that the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, overruled the *Reed* and *Harrison* cases, *supra*, and held that the collective bargaining agreement was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law. The opinion stated (173):

> "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."

It concluded that Missouri would not be at liberty to hold that adjustment provisions of a contract made under and pursuant to the Railway Labor Act constituted conditions precedent to the right to sue for wrongful discharge.

In his dissenting opinion, Judge Riddick pointed out that state substantive law was alone controlling here, stating (178):

> "The District Court was correct in holding that the controlling substantive law was that of Missouri

concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

"There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

Although a majority of the Court of Appeals found that "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, and the contract had left that ground, under proper motive, as a sufficient legal basis for the action which the employer [petitioner] took" (167), the Court went on to hold that respondent was entitled to have a jury pass on the question of whether or not he waived the notice requirements of the union contract (167-170) even though respondent admitted that he had no doubt whatever about the charge against him (144), voluntarily attended the hearing on the date agreed upon, heard the written notice read at the commencement of the hearing and stated he was ready to proceed (136, 152, 154). The Court of Appeals accordingly remanded the case for further proceedings.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the Railway Labor Act precluded the District Court from applying state law, otherwise controlling, governing the right to bring the action;

(2) In holding that the decision of this Court in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, overruled the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826;

(3) In failing to follow applicable local law that on the facts shown in the record respondent waived further notice of the hearing as a matter of law, and;

(4) In reversing the order of the District Court dismissing the complaint.

Reasons for Granting the Writ

1. The decision of the Court of Appeals in this case introduces confusion and uncertainty into an important field of labor cases where heretofore state substantive law has controlled. Basic questions directly affecting the nature and effect of collective bargaining agreements of every carrier subject to the Railway Labor Act are involved.

The basic questions here presented are bound to arise frequently in the field of industrial relations under the Railway Labor Act and it is in the public interest that this Court finally resolve these questions.*

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* Cf. *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826; *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593; *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 219; *Wallace* v. *Southern Pac. Co.*, 106 F. Supp. 742, 745 (N. D. Calif.);

2. In Missouri a contract of employment which requires an employee to attempt to adjust his dispute with his employer before he may seek redress in the courts is valid and enforceable. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826. The Court of Appeals below would limit the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and specifically overrule Missouri law heretofore controlling.

To reach such a conclusion the Court of Appeals misapplied and misconstrued the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. In refusing to apply state law in this instance, the Court of Appeals below fell into the same error which led this Court to reverse the Circuit Court of Appeals for the Fifth Circuit in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. It is respectfully submitted that the dissenting opinion of Judge Riddick below correctly states the applicable law (178):

Davis v. *Union Pacific R. Co.*, 21 CCH Labor Cases ¶66,834 (D. Neb.); *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.).

An identical question of law is currently pending in the case of *Ringle* v. *Transcontinental & Western Air, Inc.*, docketed as Civil Case No. 6490 in the United States District Court for the Western District of Missouri, Western Division. On oral motion by counsel for the plaintiff therein (who is also counsel for respondent in this case) requesting postponement of the trial in the *Ringle* case, District Judge Duncan granted the motion stating that, since he concurred in the views of District Judge Ridge in dismissing the complaint in the case at bar, he would not proceed to trial in the *Ringle* case pending final disposition of the instant case on appeal.

"The District Court was correct in holding that the controlling substantive law was that of Missouri concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

"There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

A substantial amount of litigation has arisen, and perforce will arise, in state and federal courts in this field under the Railway Labor Act where federal jurisdiction depends solely on diversity of citizenship.* "Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation."** So sweeping an overruling of state law and the limiting and misapplication of the decisions of this Court in this important labor field merit a review by this Court of the ruling of the Court of Appeals below.

3. In view of the importance in the field of labor relations of decisions of the courts involving compliance or non-compliance with steps in collective bargaining grievance procedure, the decision of the Court of Appeals in refusing to apply local law on the subject of adequacy of notice of hearing under the grievance procedure and the waiver by the aggrieved employee of further notice should also be reviewed.

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* See cases cited in footnote p. 9, *supra*.

** Dissenting opinion of Mr. Justice Frankfurter in the case of *Johnson* v. *The New York, New Haven and Hartford Railroad Co.* (U. S. Supreme Court, November 17, 1952), 73 S. Ct. 125, 129.

ARGUMENT

1. The result reached below is contrary to the decision of this Court in the *Moore* case.

By the Act of April 10, 1936, 49 Stat. 1189, Title II was added to the Railway Labor Act, 45 U. S. C. §§181 *et seq.*, thus bringing within the purview of that Act, except as to Section 3 of Title I, "every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Title II specifically provides in Section 204:*

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

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* 45 U. S. C. §184.

Under this provision of the Railway Labor Act petitioner contracted with the duly authorized representatives of its employees establishing a procedure for the adjustment of disputes of the nature of this controversy which provided for an appeal to the chief operating officer of the carrier. Respondent did not see fit to take this appeal (99). He brought his action in the District Court on the ground of diversity of citizenship. He stipulated that the contract was a Missouri contract (125). To prevail in Missouri in an action for alleged breach of such a contract, respondent had to show that he had brought himself within its terms and had been unable to secure a satisfactory adjustment by the means therein expressly provided. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, 889; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827.

Since respondent did not attempt to adjust his dispute by appealing to petitioner's chief operating officer, it was clear that under controlling Missouri law respondent could not maintain this action.

The extract from Section 204, quoted above, contains the only pertinent provisions governing the adjustment of disputes between air carriers and their employees. If the language employed by Congress is at all pertinent it would appear to invite, not merely permit, the Missouri rule. By no conceit can it be said to preclude such a result.

In 1941 this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 634, held that the Railway Labor Act did not purport "to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a

suit in court" where no such requirement existed under applicable local law.*

In holding in 1950 that courts had no jurisdiction to invade the exclusive province of the National Railroad Adjustment Board to adjudicate a jurisdictional dispute involving a railroad and two employee accredited bargaining agents this Court explained its decision in the Moore case as follows:**

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Thus the effect of the *Moore* and *Slocum* cases is to establish merely that the Railway Labor Act does not oust state and federal courts of jurisdiction to adjudicate a

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* Mississippi law, governing in that case, imposed no such requirement. *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593.

** *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244.

common-law or statutory action for wrongful discharge. What law is to apply in such an action? As set out below, this Court in the *Moore* case made it plain that the law of the state forum involved was to apply.

Moore began his case in the Mississippi state courts. A demurrer to the complaint on the ground that his *contract* required him to adjust his dispute was overruled on November 8, 1937 by the Mississippi Supreme Court, 180 Miss. 276, 176 So. 593. The Mississippi Supreme Court in refusing to enforce the contract relied on rulings in fraternal benefit society cases,* overlooking the more apposite rulings of the Alabama Supreme Court on January 18, 1934 in *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434, and *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441. After proceedings in the state court involving the question of the applicability of the statute of limitations in Mississippi, Moore amended his bill for damages in excess of $3,000 and the railroad removed the case to the Federal court. The case came to this Court on certiorari to review a judgment of the Circuit Court of Appeals which applied the Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case. In its opinion this Court noted, however, that the railroad company had advanced another reason why a judgment in its favor should be sustained in that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely

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* *Independent Order of Sons & Daughters of Jacob* v. *Wilkes*, 98 Miss. 479, 53 So. 493; *Eminent Household of Columbia Woodmen* v. *Ramsey*, 118 Miss. 454, 79 So. 351; *Eminent Household of Columbian Woodmen* v. *Payne*, 18 Ala. App. 23, 88 So. 454.

brought because of his failure to exhaust the administrative remedies granted to him by the Railway Labor Act. The highest state court had already determined that under Mississippi law a contract requirement to this effect was not a prerequisite to bringing such a suit in a Mississippi court.

The respondent railroad in the *Moore* case unsuccessfully tried to persuade this Court that under the Railway Labor Act it was Moore's duty to exhaust the remedy under the agreement. In its opinion this Court said, 312 U. S. 630, 634: "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

It is clear that the sole basis for decision on this point in the *Moore* case was that

(1) the Railway Labor Act did not impose a requirement that an employee exhaust remedies provided in an agreement with a carrier subject to the Act, and

(2) Mississippi law was controlling under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as to the necessity for exhausting contract remedies as a prerequisite to an action under the contract.

Merely because the local law of Mississippi happens to be different from the local law of Alabama and Missouri as to the necessity for exhausting such remedies does not affect the principle involved. The principle is that when an employee sees fit to sue for wrongful discharge under such a contract he divorces himself from any application of the Railway Labor Act and submits himself to an ad-

judication of his rights and remedies under the law of the forum. The obvious effect of the *Moore* and *Sloçum* decisions is to leave the state courts free to apply whatever local law is controlling in the adjudication of an action in the state court or under state law involving a wrongful discharge whether it be to require or not to require exhaustion of adjustment procedure under the contract.

In the *Moore* case the District Court had held:*

> "The decision of the Supreme Court of Mississippi was an announcement of the court of last resort in this state of the law pertaining to the contract sued upon, and under the Erie Railroad Company case is conclusive."

Far from grafting an exception to the doctrine of *Erie R. Co.* v. *Tompkins* in the field of contracts under the Railway Labor Act, this Court in the *Moore* case held that doctrine controlling in this field when it affirmed the judgment of the District Court based squarely on this premise. Under *Erie R. Co.* v. *Tompkins* the Court below was bound to follow Missouri law, and could have no possible basis for overruling *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, or *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

In holding, as the Court of Appeals did in this case (173), that:

> "Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act."

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* 24 F. Supp. 731, 733.

the court below has reached a result completely contrary to the decision of this Court in the *Moore* case and wholly at variance with the rationale of the *Moore* case. It has failed to apply local law as required by *Erie R. Co.* v. *Tompkins*, and this in the light of decisions by this Court clearly stating that the Railway Labor Act is without applicability and does not seek to interfere with application of state law in this field.

The result is obscure. Missouri law is said not to be applicable to relationships under the Railway Labor Act. The Act in Section 204 prescribes that disputes between an employee and a carrier by air, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. If, therefore, this case were a matter regulated by the Act, respondent would have been required to adjust a dispute under the procedure in the contract by handling it in the usual manner up to and including the chief operating officer of the carrier, reaching the same result as under Missouri law. The result below is inconsistent with the general intent of Congress, as manifested by the Act. In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, this Court said at pages 724-725: "To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes," emphasizing this view in footnotes 12, 18, 26 and 27. In particular footnote 18 states ". . . . The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or

minor." Similarly, footnote 26 emphasizes the Congressional direction that disputes shall be handled in the usual manner up to the chief operating officer of the carrier.

Judge Riddick in his dissenting opinion below thus ably summarizes the correct view of the *Moore* case (179-180):

> "Where either action [i. e., a proceeding before the Adjustment Board or an action at law for breach of contract] is available, the litigant has his choice. That is all the *Moore* case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling."

2. The Court of Appeals failed to apply local law on the subject of notice.

Since notice in any administrative hearing may be fundamental in determining the validity of the entire proceeding, its peculiar importance in this labor field cannot be gainsaid.

A requirement of notice assures that the flexibility so desirable in administrative hearings will not conflict with basic demands of fairness. But formality of notice is not an essential, as long as basic fairness is attained; there is no virtue in a ritualistic giving of notice. So it is the general law that one who has actual knowledge of an administrative hearing may not object to technical defects in notice. It is also the Missouri law. The decision of the Court of Appeals below is in irreconcilable conflict with

applicable local law. Again, since the conflict is basic, review by this Court is merited.

The Court of Appeals finds there was just cause, and no improper motivation, for respondent's "discharge" * (166-167, 177). Such discharge was preceded by a lengthy informal conference attended by respondent at which the charge against him was made clear beyond doubt (135, 144). At the same conference the date for holding the formal hearing was fixed for respondent's convenience (135). Respondent's collective bargaining agent admitted timely receipt of the notification letter (152). Respondent attended the hearing, stating he was ready to proceed after hearing the notification letter read aloud (136, 151, 152, 154). The Court of Appeals found no fault with this hearing, but held that notice of the hearing was not waived as a matter of law in view of respondent's subsequently claimed failure to receive a letter advising him, as he already knew, that the hearing which he attended was to be held.

If respondent did not waive notice as a matter of law when he admitted (1) he had no doubt whatever about the charge; (2) voluntarily appeared at a hearing at a date agreed upon with him for his convenience; (3) heard the written charge read and then stated he was ready to proceed, and (4) enjoyed every opportunity to present his case at a five-hour hearing, then it would appear impossible to waive notice as a matter of law.

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* Throughout this discussion it must be remembered that respondent resigned at the conclusion of the initial hearing (Ex. 2, 29-30, 89, 138).

The law of Missouri is clear that notice may be waived as a matter of law. *Butner* v. *Union Pac. R. Co.*, 236 Mo. App. 1134, 1142, 163 S. W. 2d 100, 104. The opinion of the Court of Appeals, which ignores the *Butner* case, is tantamount to a holding that notice of an administrative hearing may not be waived as a matter of law even where knowledge is admitted.

The decision of the Court of Appeals not only conflicts with applicable local law as set out in the *Butner* case; it conflicts with authorities generally. One who appears at an administrative hearing may not cavil at a lack of notification or at errors therein. *Merrill on Notice*, Sections 905, 906.

The confusion of law created by the decision of the Court of Appeals below on this point would have been obviated had it observed the Missouri rule that an employee must attempt to adjust his dispute with his employer as required by contract before he may burden Missouri courts with litigation. The appeal to petitioner's chief operating officer is a proceeding de novo at which respondent would, a second time with full notice, have every opportunity to present his case and obtain his employer's final decision within 10 days thereafter (Ex. A, Art. XI (b) (5), 66).

In effect, the Court of Appeals held that administrative adjustment provisions of a contract must be ignored,* ex-

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* "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173).

cept that the employer must not ignore them. And even though an employer has just cause for discharging an employee, the employee nonetheless has a cause of action should the employer deviate, however minutely, from the administrative adjustment provisions of the contract which the Court of Appeals says are otherwise to be ignored.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Railway Labor Act, Title II, P. L. 487, 74th Cong. 2d Sess., April 10, 1936, 49 Stat. 1189:

"TITLE II

"SECTION 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"SEC. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof.

"SEC. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

"The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

"SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional

boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

"SEC. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the 'National Air Transport Adjustment Board.' Two members of said National Air Transport Adjustment

Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 3 of title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of title I of this Act. The powers and duties prescribed and established by the provisions of section 3 of title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board

by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

"SEC. 206. All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. The books, records, and papers of the National Labor Relations Board and of the National Labor Board pertinent to such case or cases, whether settled or unsettled, shall be transferred to the custody of the National Mediation Board.

"SEC. 207. If any provision of this title or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"SEC. 208. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act."

Approved, April 10, 1936.